United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1073

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ISRAEL DIAZ-MARTINEZ,

Defendant-Appellant.

On Appeal From the United States District Court
For The Eastern District Of New York

Appellant's Brief

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

The appellant ISRAEL DIAZ-MARTINEZ, appeals from a judgment rendered in the United States District Court, Eastern District of New York, (Chief Judge Jacob Mishler) whereby the appellant was convicted after trial before a jury, under count 1 of the indictment herein, charging a violation of a conspiracy to violate 21 U.S.C. 841(a)(1) in violation of the special conspiracy statutes found in 21 U.S.C. 846.

As a consequence the appellant was sentenced to a term of imprisonment for a period of five (5) years and a special parole term of ten (10) years.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

A. Was the appellant's right to a fair trial, the appellant having testified in his own behalf, and the right to make a defense prejudiced where the Court allowed the government to refer to evidence and introduce evidence that the Court had already suppressed (4th Amendment to the Federal Constitution) and the Court did not instruct the jury as to the limited effect of such evidence and cross examination of the appellant as to such evidence, such limited effect being that the use of such evidence was merely to impeach the appellant's credibility?

B. Did the Court properly charge the jury as to the evaluation of the testimony of accomplices?

STATEMENT OF THE CASE AGAINST THE APPELLANT:

In this case the jury did not have the government's evidence to solely consider but also a factual defense supported by the appellant's testimony. See U.S. v. Frank, 494 F. 2d 145, (Cir. 2d, 1974) at page 153 this Court stating in part that:

> "In passing on the sufficiency of the evidence, the Court had only the prosecution's case, the defense having offered none ... but the self-incrimination clause does not elevate a defendenat's silence much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw

inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version ..."

The indictment in this case joined the appellant with other defendants in the first count charging conspiracy to violate the narcotics statute. The substantive count that was considered by the jury did not charge the appellant with a violation of the statute underlying this count, 21 U.S.C. 841(a)(1).

Barry Paul Abbot was a drug enforcement agent (57)*. The Court deemed this witness an expert in narcotics (57, 59-65).

In October 1973 he met a co-defendant named Victor Blanco at his apartment at 97 Clinton Avenue in Brooklyn (67). He was introduced to Blanco by an informant (69). Abbot inquired from Blanco about buying an ounce of cocaine. Blanco told him that he had a friend who could supply the agent (70, 71).

On November 5, 1973 Abbot and the informant met Blanco at his apartment (71, 72). After Abbot arrived another co-defendant named Manuel Fiffe arrived. Fiffe spoke to Blanco in Spanish and then handed Abbot a package which contained cocaine of an inferior quality (74, 80).

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* ( ) This refers to the pagination of the appendix.

Fiffe asked for $700.00 as the price but settled for $675.00 which the agent gave to him (81-83). Abbot told Fiffe he was interested in future purchases (83).

On November 8, 1973 the agent received a call from Blanco who told him of a "new shipment of uniforms" which of course meant narcotics (90-92). Abbot, accompanied by another agent, met Blanco, Abbot introducing the other agent as "Biff" (92, 93). All drove to a clothing store located at 293 Grant Street, Brooklyn. Abbot and Blanco went inside and Fiffe displayed a sample (94, 95). Abbot approved the sample and agreed to buy an eighth of a kilo indicating he was in the market for a quarter of a kilo also (96, 97). The price for the quarter of a kilo was fixed at $2900.00 and Abbot protested that it was too high. Blanco told Abbot that because of the quality of the cocaine it could be well diluted (97-99). Abbot told Blanco he would return the following Monday to complete the purchase; Blanco and Fiffe then went to a closet where the agent heard "snorting" (98, 99). Fiffe shortly reappeared and gave Abbot a sample of the cocaine (101). While at the store Abbot saw the appellant (103).

On November 12, 1973 Abbot and "Biff" again met Blanco and the agent told him that he wanted the eighth of the kilo he previously saw. Blanco made a telephone call and told Abbot that they had to go to the clothing

store (107, 108). They drove to the store at 293 Grant Street (108, 109). At the store Fiffe told Abbot that "it" would shortly be there (109-111). Abbot saw Fiffe dial telephone number 387-7180 and converse. Completing the call Fiffe told Abbot that the package would shortly arrive (112, 113). Abbot left the store and met with a third agent named Chellino (114, 115). Thereafter Abbot returned to the store and again saw the appellant there (115). Abbot asked Blanco who Diaz was and Blanco told him that Diaz was the "boss of the store" (116). Again Abbot left the store, spoke to Chellino and returned to the store (117). There Fiffe showed Abbot a small box and asked him to follow to a basement through a trap door (118, 119). In the basement Fiffe displayed the cocaine which was of a better quality than the previous purchase (120, 121). Abbot agreed to buy it, bargained, and then paid $2900.00 (122, 123). Blanco said that Fiffe was a messenger and could not reduce the price (122, 123, 125). At this phase, Abbot saw the appellant and Miranda at the store (127). On November 20, 1973 Blanco asked the witness to see him about "new uniforms" (131). Accordingly he went to Blanco's apartment and met Fiffe (133). Now Fiffe said he wanted to deal in larger quantities such as a quarter or half a kilo (135). Abbot explained that he was discouraged because of the

low quality of the previous purchases (136). When Fiffe indicated the source of a higher quality the witness asked to meet the source (136, 137). Fiffe then made a call and Abbot by looking at a card displayed by Fiffe ascertained the telephone number to be 657-1358 (137, 138). Fiffe made an appointment for the witness to meet the source (138). Ultimately all went to the Estrella Record Shop at 1428 Gates Avenue, Brooklyn (140, 141). There the witness met the two co-defendants Vivas and Bermudez (142). A third unidentified person was also present. Blanco said that Bermudez was the "boss" (143). Abbot waited for the shipment which did not yet arrive (149, 150). Ultimately a package was shown to him by Vivas (152). Abbot said the contents were of a good quality but that he did not have enough money to buy all the contents (152, 153, 155). Vivas told him that he would not break up the quantity but that Abbot would have to buy it in its entirety (155-157).

Abbot later told Blanco that he wanted to buy a quarter of a kilo but Blanco told him that only the larger portion would be sold (163).

On November 23, 1973 Abbot met Blanco at his apartment. Blanco told him he could not contact Fiffe because the store was closed (165, 167, 168).

On November 26th Abbot with "Biff" again went to the clothing store with Blanco to see Fiffe (169).

He saw the defendant there and also one Ralph Diamond (169, 170). This witness spoke to Fiffe about a larger purchase from Bermudez (171).

On November 29, 1973 Abbot met Juanita Guzman a/k/a Juanita Diaz at Blanco's apartment (172). He saw this woman previously at the clothing store. Abbot discussed larger purchases with Blanco; Guzman told him that her "husband" was "boss" of the clothing store (175). She said she would try to arrange for Abbot to deal directly with Bermudez (176, 177). She added that if Abbot wanted smaller quantities he should go to the store saying "if you want quarters, come to the store. We can take care of you." (177).

On April 3, 1974 Abbot returned to Estrella's Record Shop and spoke to Vivas (178). Vivas told Abbot that he had nothing when Abbot asked him for a half a kilo (179, 180). On a later visit to that store on April 5, 1974 Vivas again indicated that he had "nothing" (181).

Alexander Dovedko, another agent, testified (192). He related that he had Abbot and other agents under surveillance and saw them visit 9[illegible] Clinton Street, Blanco's apartment, the clothing store, the record shop, at the times related by Abbot in his previous testimony (193, 195, 197, 199, 200, 201, 203, 204, 206, 208, 210, 213, 215).

On November 12, 1973 during the surveillance he saw Miranda enter and leave the clothing store with the appellant (204). Miranda and the appellant were followed to an auto body shop where they spoke to persons inside (205).

Nicholas Alleva, another federal agent, testified that he observed Abbot and others on November 5, 1973 (216, 217). He followed Abbot and Fiffe to 293 Grant Street (218). He observed Fiffe approach the appellant in the store and the two went into a back room and shortly thereafter emerged and then went to Miranda who was in the store. Fiffe was further observed to have given a package to Miranda (220, 221). On November 20, 1973 this agent saw Abbot enter and leave 97 Clinton Avenue. He also saw Fiffe enter those premises. Ultimately he followed them to the record shop (221-223).

Next, the government called Fiffe as a witness (280). His testimony had to be translated by a Court interpreter (280, 281). He related that he was convicted under the indictment in this case (283). He worked for the appellant at the clothing store (287, 288). On November 5, 1973 he began trafficking in cocaine for the appellant (291, 292). The appellant was his source of supply (293). He received no profits from sales (295). He also used cocaine (296, 297).

Fiffe knew Blanco (298).

Diaz rented an apartment for Juanita Guzman (299). The appellant allegedly prepared cocaine at that apartment (300).

Fiffe related that he met Abbot, the agent, and made sales to him (303). Thus as to the sale of November 5, 1973 the appellant gave Fiffe the narcotics which he delivered to Blanco who made the sale to Abbot (303, 304). Diaz set the price of that transaction at $500.00 (304, 305).

On November 8, 1973 Fiffe spoke to Barry about a sale of a quarter of a kilo of cocaine. The appellant allegedly gave Fiffe a sample to give to Blanco and the agent and ultimately he gave it to the agent, Barry, on November 8, 1973. This was the day he also "sniffed" the cocaine (309-311).

On November 12, 1973 he again met Barry and this meeting was previously arranged for the day before by Blanco. He informed the appellant that on November 12, 1973 Barry and Blanco were expected at the store to purchase an eighth of a kilo. The appellant told him that the narcotics would be at the store at about 4:00 P.M. that day (309-312). On that date the appellant and Miranda left the store before Barry arrived. The appellant told Fiffe to wait at the store for his telephone call. The appellant did call him and told him

to tell Miranda to go to Guzman's apartment (312, 313). That day Miranda did deliver an eighth of a kilo of cocaine to the store and this was after Fiffe called Guzman's apartment. The appellant told Fiffe to keep the package in the basement of the store until Barry and Guzman arrived (315).

When Barry and Blanco arrived Fiffe took them down to the basement. After Barry approved the quality Fiffe told him the price was $2900.00 (315). Barry ultimately paid (316).

On November 19, 1973 Blanco asked Fiffe whether he could arrange for a sale to Barry in a larger quantity, namely half a kilo (317). However, Fiffe admitted that he never saw the appellant sell a half a kilo of cocaine. At the most he ever sold with the appellant being his source was one eighth of a kilo (318, 319). However he did ask the appellant whether he could produce half a kilo of cocaine. The appellant replied that he was waiting for the arrival of some cocaine but he didn't know when it was going to arrive and that he had no more cocaine to sell at that time (319-321).

It may be recalled that there was testimony that Fiffe drove a Mercury 1967 car. That car was given to him by the appellant and he drove it to the meetings that were testified to by the previous government witnesses.

These meetings were those of November 5th, 12th and 20th (343).

Next, the government called Luis Felipe Miranda. As can be expected he was a narcotics offender both in the past and under the indictment in thise case (352, 353). Prior to his arrest in this case he was employed by the appellant at his clothing store, previously described (355). In October 1972 he spoke to the appellant and Fiffe about the clothing business being poor (357, 358). According to the witness the appellant then began dealing in cocaine so that Miranda and Fiffe could earn some money (357, 358). On October 3, 1973 he, the appellant and Fiffe began selling cocaine (358). The witness related that the appellant lived with Guzman (358, 359).

He also related that the appellant received calls at the store about cocaine (359). Fiffe told him that on one occasion he didn't get paid for his narcotics activity (359, 360). However, he also related that Fiffe did receive tips from the narcotic customers (360). Guzman's apartment, according to this witness, was the storage place for the cocaine (360, 361). He also picked up a package of narcotics from her apartment at the appellant's direction (361).

According to Miranda, narcotics were kept

in the basement of the store as well as in old clothes (362). He saw the appellant bring narcotics into the store on two occasions (362). He also delivered narcotics supplied to him by the appellant (363, 364). He received $600 to $1000 weekly for such deliveries and gave the proceeds to the appellant (364).

The appellant, according to the witness, also "cut" the narcotics and the usual amount was one eighth of a kilo (364, 365). On or about October 30th or 31st 1973 Miranda spoke to the appellant about quitting but the appellant threatened to tell his parole officer and thus jeopardize his conditional liberty (368, 369). On November 5, 1975 he received a phone call from the appellant who told him to go to the apartment at 239 South 4th Street in Brooklyn. There he saw the appellant and Guzman. The appellant had him taste the narcotics for quality (369, 370). The appellant and Guzman then mixed the narcotics and tested its quality in the mixed state (370). On November 12, 1973 he went to the clothing store with the appellant. There Fiffe told him of a proposed purchase. The appellant left the store with Fiffe telling Miranda he would call him back (371). The appellant called him and he went to Guzman's house to get a package which she gave him (372-374). In turn he gave this package to Fiffe who told him that Blanco

and the agent (Barry) were expected to make a purchase (374).

THE DEFENSE:

As part of the opposition to the government's case, the appellant successfully moved in timely fashion to have the evidence suppressed under a search warrant that was executed March 26, 1974 (7-12). The evidence seized under that warrant was seized in the basement of the clothing store (13).

The Court narrowed the issue underlying the search and seizure as to whether the search warrant was specific or too broad (14, 17, 27-29). To determine the issues, as to how the warrant was executed, the Court conducted an evidentiary hearing (227, 236, 241, 246, 247, 249, 256, 259, 269). The seizures in this case (which did not consist of narcotics, but implements used in connection with narcotic trafficking) were seized in the basement of the store (269). The Court granted the motion holding that the warrant was a general warrant and did not specifically describe the exact area to be searched under the warrant (273-275). The Court therefore suppressed the evidence that was retrieved in the basement of the store (276-279).

Thereafter, when the appellant was cross examined, the Court allowed the product of the search and seizure

to be used by the prosecutor.

The appellant called a witness named Rivera who testified that in September 1973 he was a part-time worker for the appellant. His employment continued to October 1973 and he worked at the store at 239 Grant Street. His job was to deliver clothes to customers (453).

He knew Miranda, the government's witness (454). In September 1973 Miranda spoke to him about cocaine and this witness told him that he didn't use it (456). Miranda cautioned him not to tell the appellant because if the appellant learned of this he would fire him (456). However Miranda did give him a card and told him that if he had a buyer for cocaine to call him, namely Miranda (458). This card was admitted into evidence as to its face and not its rear as Defendant's Exhibit "E" (459). The witness explained he never saw cocaine before that day (460). He never saw the appellant in possession of cocaine. Further, the appellant was usually in and out of the store during the day (461). This witness also knew Fiffe who stayed in the store during the day (461).

Helen Berrios testified that she was a barmaid (463). She knew Fiffe and spoke to him prior to July 1974 (464). During the summer of 1974 she received

several telephone calls from Fiffe (465). Fiffe, over the telephone, told her to tell the appellant to retain an attorney for him and to supply his wants as he was in jail (466).

In August 1974 Fiffe told her that if the appellant didn't help him out Fiffe would implicate him in Court by perjuring himself and further that he would kill the appellant (466, 467).

Berrios also knew Miranda for about three or four years previously. Miranda called her in the summer of 1974 and asked her to tell the appellant to help him pay for an attorney and that if he didn't he would implicate him falsely (467, 469).

Next, the appellant testified that in 1972 he went into the clothing business under the corporate name of Boro Wide Clothes Corp. (471, 472). He then moved his business to 293 Grant Street, Brooklyn (472). He described the distribution of clothes (473).

The appellant explained that he stayed in the store for about two to four hours and then conducted his business (clothing) outside of the store (474). He employed Fiffe whose duties required him to stay in the store during business hours (476). The appellant described the neighborhood or area as one that was frequented by drug users (477). He knew that Fiffe

used narcotics (477, 478).

The appellant met Guzman through Miranda (478). He utilized her as a cashier in the store. He also gave her money (479).

The appellant testified he never saw narcotics at the store (480, 481).

The appellant denied handling or trafficking cocaine in Guzman's apartment (480).

Continuing his testimony, the appellant explained that he met Miranda in 1971 and gave him a job when Miranda told him that he was under indictment for a narcotic violation and needed a job (481). Miranda apparently went to jail thereafter and when he was released was re-employed by the appellant in 1972 (481, 482).

The appellant stated that he told Miranda that business was bad and that he couldn't continue to employ him (483). Consequently he bought Miranda a stand at a public market at 110 Moore Street to sell clothing (483, 484). The appellant then described the physical layout of the building at 293 Grand Street, Brooklyn (484-486). The building was characterized as being tenanted by other people (486). There was a trap door to the basement in the store (485). The tenants of the building had access to the basement from the street level entrance to the basement (486). The appellant

testified he did not know Vivas and Bermudez, the co-defendants in this case (487, 488). Nor did he ever see Abbot or the other special agents before the case (468).

After the appellant's arrest, Fiffe and Miranda called him (489). As a result of the calls he sent them each $50.00 (490). The nature of the calls from Miranda and Fiffe were threats to coerce the appellant to help them, the government witnesses telling him they would implicate him if he didn't (490-492).

During the cross examination of the appellant he was questioned extensively about the product of the search and seizure under the void warrant. Thus the prosecutor pressed the appellant as to the search of the store on March 26, 1974 (537). The appellant was questioned about narcotics being in the store and implements used to prepare the narcotics for trafficking (539). The prosecutor questioned him about lactose being found in the basement of the store as well as plastic bags (539, 540). Not only did the appellant deny that he knew about these articles, but he stated that he used plastic bags to wrap shirts and pants (540). The appellant was further questioned about a strainer being found in the store (540).

Continuing the cross examination in this area, the appellant was questioned about the search warrant

which was declared void and the search under the warrant (541, 542). He was further questioned about a statement he gave to Fiffe to the effect that it was to his benefit that he moved marijuana out of the basement prior to the execution of the search warrant (542).

Then the void warrant was received in evidence as part of the government's case (Government's Exhibit A, 544). The statement on the warrant was used in an effort to impeach the appellant's credibility (545). It thus appeared that the appellant wrote on the warrant words to the effect that he pushed an agent out of the basement when the warrant was being executed (546, 548).

Again the appellant was questioned about the lactose found in the basement (549). The Court further allowed the prosecutor to read the return which resulted from the execution of the search warrant and contained an inventory of the products of the void search and seizure (549, 557, 558).

Lastly, a stipulation was entered into by appellant's counsel and the prosecutor as to what was found in the basement in order to spare the time of the Court by the calling of additional witnesses (565, 566, 567, 568, 590, 591).

REBUTTAL:

At this phase of the case the government called a witness named Rodriguez who testified that he was a New York City policeman (577). He related that on January 17, 1975 he was at a bar known as Jose's Bar (578). He spoke to the appellant at the bar (578, 579). He told the appellant that he wanted to buy a half a kilo of cocaine and the appellant allegedly told him that he didn't have any but he expected a shipment within a couple of days (580, 581). In that conversation the appellant told him that the witness should call the clothing store and that if he weren't there he should call for Fiffe (581).

For counter rebuttal, the appellant testified he was not at the bar when the previous witness testified he was because that particular day was a Thursday and that the stores were open late. Therefore, to carry on the clothing business he had to supply the stores and to get the salesmen ready for Friday which would be pay day so that the customers would be able to purchase clothing (586, 587). The appellant denied ever seeing the previous witness, Rodriguez (599).

POINT I

THE COURT DID NOT INSTRUCT THE JURY AS TO THE LIMITED PURPOSE FOR ADMITTING INTO EVIDENCE THE MATERIALS SEIZED IN THE PREMISES UNDER THE VOID SEARCH WARRANT AND FURTHER PREJUDICED THE APPELLANT'S RIGHT TO A FAIR TRIAL BY ALLOWING THE GOVERNMENT PROSECUTOR TO EXCESSIVELY CROSS EXAMINE THE APPELLANT AS TO HIS POSSESSION AND KNOWLEDGE OF THE MATERIALS SEIZED UNDER THE VOID SEARCH WARRANT AND LASTLY, PREJUDICED THE APPELLANT'S RIGHT TO A FAIR TRIAL BY ALLOWING THE VOID SEARCH WARRANT INTO EVIDENCE.

No narcotics were found in the basement of the clothing store. Instead, lactose and other instruments that could be used in preparing cocaine for sale were allowed in evidence. The predicate for the introduction of this evidence was Walder v. U.S., 347 U.S. 62 (1954); Harris v. New York, 401 U.S. 222 (1971) and the recent holding in Oregon v. Hass, Supreme Court, March 19, 1975, 16 Criminal Law Reporter, 3120. Earlier a similar issue was considered in Agnello v. U.S., 269, 20 (1925). These cases considered what if any use the government or prosecution can make of evidence excluded under the exclusionary rules attached to the 4th Amendment to the Federal Constitution (Walder and Agnello) or the 5th Amendment's guarantee against self-incrimination (Harris and Hass).

Walder dealt with two conflicting rights. The right of a defendant to testify (truthfully) and

the right to be free of illegal search and seizure. But in Walder it was held that where an accused testified and denied ever dealing in narcotics, the government could cross examine the accused as to an earlier dismissed case involving narcotics where the dismissal was based on an illegal search and seizure. However, the cross examination in Walder was limited and related to collateral material. On page 64 it was recognized that:

> ". . . The trial judge admitted this evidence, but carefully charged the jury that it was not to be used to determine whether the defendant had committed the crimes here charged, but solely for the purpose of impeaching the defendant's credibility ..."

As will be argued below, there was no such limited instruction to the jury in this case.

Next, this problem reoccurred in Harris v. New York, 401 U.S. 222, supra, involving an involuntary confession. The confession was used to impeach the testimony of the accused who testified in his own behalf at a state trial. Finding that the ruling in Walder relating to collateral matters, was nevertheless applicable to directly impeaching evidence by way of a confession the Court held on page 224 in part that:

> "... It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."

It is submitted to the Court that the evidence suppressed in this case was consistent with innocent use and with ordinary materials.

In Oregon v. Hass, March 19, 1975, supra, 16 Criminal Law Reporter, 3120, the Harris ruling was applied to a state of facts where the police did give full Miranda warnings but the defendant could not get a lawyer immediately after asking for one. During this hiatus, he incriminated himself. The opinion in Hass recognized the limitation in Harris, namely, that the evidence be trustworthy, at page 3122. Harris also recognized the limited nature of the introduction of such suppressed evidence.

However, there was a holding in Hass at page 3123 that:

> " ... If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."

It is respectfully submitted that in the precise facts attendant to this case the execution of the void search warrant was more penetrating in a grosser violation of the applicable constitutional right than the circumstances in Harris and Hass. For in Harris and Hass the involuntariness of the confessions was not

in the intensive coercion sometimes used to get confessions, but in the failure to conform to the formalism required by Miranda.

In this case the appellant's store was broken into and searched and seizures were made under a void warrant. This was a gross violation of the 4th Amendment to the Federal Constitution. It was also a violation of the privilege against self-incrimination, because subjecting a person or his property to a search and seizure is also causing the person to incriminate himself. See Boyd v. U.S., 116 U.S. 616 and Mapp v. Ohio, 367 U.S. 643 (1961), concurring opinion of Mr. Justice Hugo Black, footnote 4 at page 662.

It was not brought home to the jury that the suppressed fruits of the illegal search had a limited evidentiary value. Furthermore, the Court admitted into evidence the void search warrant itself. It is submitted this was not necessary. The inventory, that is the catalog of the fruits of the search, were orally described before the jury. But additionally the jury had before it the void search warrant and the written inventory or a stipulation as to what was seized. The search warrant to a lay jury had the appearance of legality and could be recognized by laymen as putting an official stamp of approval on the government's contentions as to

the appellant's guilt. Furthermore the questioning of the appellant by the prosecutor as to the fruits of the search was not limited and brief but a penetrating cross examination hereinabove set forth in the appellant's statement of facts, supra. It is suggested that Walder, Harris and Hass emphasized the limited use of suppressed evidence.

Earlier it was held in U.S. v. Birell, 269 F. Supp. 716 (S.D.N.Y. 1967) at page 727 that:

> "While there still may be some viability to the rule that the government can employ suppressed evidence in challenging the testimony of defense witnesses as to collateral matters, it is undisputed Supreme Court doctrine that tainted material may not be utilized on cross-examination bearing directly on the question of innocence or guilt ... (citing authority) ..."

The defendant's testimony in his own behalf, it is submitted, amounted to no more than just a general denial. The author of the majority opinion in Harris v. New York, the Chief Justice of the United States, also was the author of a dissenting opinion in Lockley v. U.S., 270 F. 2d 915 (C.A.D.C., 1959) on page 918 the dissent stating in part:

> " ... From the Walder case I would conclude that before inadmissible evidence can be used for impeachment three factors must be present: (1) the defendant must elect to take the stand, (2) his testimony which conflicts with the inadmissible statements must do more than

> merely deny the elements of the crime for which he is being tried, and (3) the inadmissible statements should be received only to the extent that they do not admit the very acts which are essential elements of the crime charged. ..."

It was further held in the dissent that where the impeaching material is to be offered the Court should compare the defendant's testimony with the inconsistent illegal evidence and only to receive in evidence that part of the inconsistent evidence which does not reach a confession of guilt by the defendant.

It is put that the suppressed evidence in this case when admitted related to proof of the government's case in chief. For the conspiracy count alleged that there was an agreement to distribute and possess with intent to distribute the cocaine (A-9). The material found in the basement was not narcotics. Such material could have been used for distribution namely the packaging and mixing of the narcotics. Of course the evidence found could also have been used for innocent purposes. The products of the void seizure could have been considered by the jury as corroboration of the testimony of the self-confessed narcotic offenders who testified for the government. The basic charge in this case runs from pages 592 to 636. Nowhere in the charge or even

later supplemental charge was there a cautionary instruction by the Court to the jury about the limited nature of the introduction of the articles constituting the suppressed evidence. On pages 608-609 in part the Court instructed the jury that:

> "I cannot recall whether a witness was faced with a prior inconsistent statement during this trial, and that is what we call impeaching a witness, which means that a lawyer may ask the witness whether at a previous time he made a statement that is different than the testimony he gave before you ..., then you determine the effect a prior inconsistent statement has on the credibility of that witness."

Of course what was introduced by the government were not oral inconsistencies but real evidence. Consequently the jury even if it could understand the limitation of inconsistencies as to credibility of a witness, had before it evidence which it could consider as evidence in chief and in support of the government's case. There was nothing limited about the introduction of the suppressed evidence.

True the Court told the jury that inconsistent statements bears only on credibility. But this obliquely worded instruction did not bring home to the jury that inconsistencies could not be evidence in chief. See Jackson v. Denno, 370 U.S. 368 (1964); Bruton v. U.S., 391 U.S. 123 (1968).

As was stated in Note, 42 Geo. L. J. 563, 565 (1954):

> "It is easy enough to instruct the jury that the facts are to be weighed only when determining defendant's character for truth and veracity. Whether a jury would stay within these prescribed limits is questionable. The danger of using impeaching evidence substantively is probably increased where the impeaching evidence is closely related to the material issue of the case."

In other words, the type of evidence in this case confused the jury, the jury's function being only to consider the impeaching nature of the suppressed material and to stop all consideration of such evidence as to proof of guilt. This the jury was never told.

POINT II

THE APPELLANT'S REQUEST THAT THE COURT INSTRUCT THE JURY AS TO THEIR EVALUATION OF THE ACCOMPLICES' TESTIMONY WAS ERRONEOUSLY DENIED

The appellant excepted to the Court's instructions to the jury as to the weight to be given to the accomplices' testimony (642). The Court's instructions to the jury as to the weight to be given to testimony of an accomplice is found on pages 613, 614 of the appendix. The instructions in part stated that:

> " ... However the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. Their testimony is not to be considered by you as you might consider any ordinary

> layman's testimony. You must recognize that they participated in the crime charged ..."

The Court properly instructed the jury that the testimony of an accomplice need not be corroborated. However, in view of that instruction, it would seem that the request by counsel for the appellant as to the language of this Court as to the evaluation of an accomplice's testimony should have been given. See U.S. v. Padgent, 432 F. 2d 701 (Cir. 2d, 1970), at page 704 this Court stating in part:

> "An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony ..."

The Court did not tell the jury that an accomplice has a personal stake in the result of a trial. In short, the Court while telling the jury that evidence of an accomplice must be weighed carefully and received with caution, did not bring the full impact of the danger of an accomplice's testimony by telling the jury of the stake the accomplice had in the trial.

See also U.S. v. Gonzalez, 488 U.S. 833 (Cir. 2d, 1973).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED:

Respectfully submitted,

ZUCKERBERG, SANTANGELLO
& MAHLER, P.C.
Attorneys for Appellant

ARNOLD E. WALLACH
of Counsel on the Brief

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 14 day of APRIL, 1975 deponent served the within upon U.S. ATTORNEY

attonrye(s) for Appellee.

in this action, at 225 CADMAN PLAZA E.
BROOKLYN, N.Y. 11201

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
14 day of APRIL, 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976